

D.T.E. 01-55

Joint petition of Dover Waterworks, Inc. and Dover Water Company, Inc. for approval of an offer of settlement by which Dover Waterworks, Inc. agrees to transfer its water supply system to Dover Water Company, Inc.

APPEARANCES: Lawrence R. Bowers, Esq.
40 Grove Street
Wellesley, MA 02482
FOR: DOVER WATERWORKS, INC.
Petitioner

Jonathan Fryer, Esq.
9 Whiting Road
Dover, MA 02030
FOR: DOVER WATER COMPANY, INC.
Respondent

I. INTRODUCTION

On July 25, 2001, Dover Waterworks, Inc. (“DWW”), pursuant to G.L. c. 164, § 92 and G.L. c. 165, § 2, filed with the Department of Telecommunications and Energy (“Department”) a complaint (“Complaint”) in which it sought mediation of a dispute involving certain expenses charged to DWW by Dover Water Company, Inc. (“DWC”) under the terms of a water supply contract. DWW’s petition was docketed as D.T.E. 01-55.

DWW is a customer-owned water system supplying 15 customers in the Bretton Road area of the Town of Dover, and since 1996 has been purchasing all of its water requirements from DWC under the terms of successive wholesale service contracts (Exhs. DWC-2; DTE 1-1). DWC is a small community water system which commenced operations in 1963 and currently serves approximately one-third of the Town of Dover (Exh. DWC-1 at 2). DWC presently serves 454 retail rate customers on the DWC distribution system, 65 retail customers and one master meter connection under separate agreement with the Town of Dover, and one master meter connection under a wholesale contract with DWW (id.).

On March 27, 2003, DWW and DWC (jointly, “Parties”) filed with the Department an offer of settlement (“Settlement”) by which DWW agreed to transfer its water supply system and substantially all of its rights and assets to DWC, and DWC agreed to assume operation of such water system, acquire those rights and assets, and provide service to certain existing customers of DWW (Settlement at 1). The Parties asserted that the intent of the Settlement was to provide reliable water service to the customers of DWW and to settle pending litigation

before the Department (id.). The Parties represent that the Settlement is subject to Department approval after a public hearing (Settlement at ¶ 1).

On June 12, 2003, pursuant to notice duly issued, the Department conducted a public hearing to afford interested persons the opportunity to comment on the Settlement, and an evidentiary hearing. There were no intervenors, no comments were submitted, and no members of the public appeared at the public hearing. DWC presented the testimony of Judith F. Wotton, president and treasurer of DWC. DWW presented the testimony of Drew M. Mittelman, president of DWW, Howard Curtis Siddall, treasurer of DWW, and Hilary Jean, an environmental engineer with the Massachusetts Department of Environmental Protection (“DEP”). The evidentiary record consists of 27 exhibits and one response to a Department record request.¹

II. DESCRIPTION OF SETTLEMENT

According to the Parties, the Settlement will provide for the integration and enhancement of water service in the Town of Dover and resolve all issues before the Department in this proceeding. Under the terms of the Settlement, DWC has agreed to purchase the assets of DWW for the sum of one dollar (\$1.00) (Settlement at ¶ 3). The Parties agree that the present value of DWW’s system is \$181,069, and that the fair value of a water supply system the size of DWW’s system that meets DWC’s engineering standards (“upgraded value”) would be \$303,310 (id.). In recognition of the fact that DWW’s system has some

¹ In addition, pursuant to 220 C.M.R. § 1.10(3), DWC’s 2002 Annual Return to the Department was incorporated into the record by reference (Tr. at 7).

remaining value, the Parties agreed that DWC would be credited with \$122,241, representing the difference between DWW's present value of \$181,069 and the upgraded value of \$303,310 (id.; Exh. DWC-1, at 14-15). The Settlement also provides that DWC would receive a second credit of \$27,445, representing a negotiated credit for settlement of this proceeding (Settlement at ¶ 3; Tr. at 11, 23). Additionally, DWW agreed to pay DWC \$13,000 for the cost of executing this transaction, resulting in a total payment by DWW to DWC in the amount of \$162,686 (Settlement at ¶ 7). The total payment of \$162,686 will be assessed by DWW on an equal basis to each of its present customers who desire to receive future water service from DWC (id. at ¶¶ 1, 7).

III. POSITIONS OF PARTIES

A. Dover Waterworks

DWW requests that the Department approve the proposed Settlement because the Settlement meets a number of public interest goals. These goals include: (1) resolution of concerns over public health issues in DWW's system; (2) expansion of DWC's service as a regulated water company to residents in DWW's service area; and (3) potential for DWC to provide service in the future to homes presently being served by private wells in an area where small lot sizes and septic systems may ultimately affect the continued ability of these homes to use their individual wells (Exh. DTE 1-3; Tr. at 33). Additionally, DWW states that its ability to safely and effectively operate a water system is beyond the present capacity of its volunteer management (Exh. DWW-1, at 3; Tr. at 29-33). DWW represents that it exhaustively

examined all options and concluded that without the transfer, its customers would be exposed to a catastrophic state of affairs with regard to securing a safe and reliable water supply (Tr. at 33-35).

B. Dover Water Company

DWC requests that the Department approve the proposed Settlement because the Settlement will conclude the litigation between the Parties without costly legal and court fees (Exh. DWC-1, at 15). DWC argues that the additional revenues generated from DWW customers, along with the potential for additional connections in DWW's service area, will spread DWC's costs over a greater customer base and serve to maintain rates (Exh. DWC-1, at 15). DWC also argues that the acquisition of DWW's property will result in a potential source of additional water from DWW's former well (Exh. DWC-1, at 15). DWC contends that the proceeds it will receive from DWW under the Settlement will defray maintenance and repairs to DWW's distribution and reimburse DWC for a portion of both the disputed costs and other expenses related to litigating this proceeding (Exh. DWC-1, at 15). Finally, DWC asserts that the customers of DWW will benefit from having a professional water supplier that can ensure a reliable supply of potable water (Exh. DTE 1A-6, at 1).

IV. STANDARD OF REVIEW

General Laws c. 164, § 92 ("Section 92"), as made applicable to water companies under G.L. c. 165, § 2, provides that the Department may, upon written petition from any person aggrieved by the refusal or neglect of a water utility to supply him with water, order such utility to supply water to the petitioner upon legal and reasonable terms and conditions.

The language of Section 92 makes it clear that the Department is ultimately responsible for determining whether the proposed terms of service are reasonable. Riverdale Mills Corporation, D.P.U. 85-130, at 9 (1985). The Department has long held that a company's customers cannot fairly be asked to finance, without limitation, the costs associated with an extension of facilities which is made solely for one customer's benefit. Petition of Frank B. Hopewell, D.P.U. 254 (1920); Cooper v. Southern Berkshire Power & Electric Company, D.P.U. 7968 (1947). It would be unfair to allow a company to require other ratepayers to subsidize substantial capital expenditures for the benefit of a single customer. Riverdale Mills Corporation, D.P.U. 85-30, at 12.

Additionally, pursuant to G.L. c. 165, § 4, the Department has general supervision of all corporations and companies subject to G.L. c. 165, which includes DWC. This broad grant of supervisory authority provides the Department with the regulatory basis for assessing DWC's acquisition of DWW. Consequently, the Department must review the costs associated with the acquisition of DWW and whether these costs adversely affect current DWC customers.

The Department has previously accepted offers of settlement as a means of resolving Department investigations instituted in response to customer-initiated petitions. Plymouth Water Company, D.P.U. 91-254, at 5 (1992); Witch's Brook Water Company, D.P.U. 1646 (1985). In assessing the reasonableness of an offer of settlement, the Department must review the entire record as presented in the utility's filing and other record evidence to ensure that the settlement is consistent with the public interest. See Massachusetts Electric Company,

D.P.U. 91-205, at 4 (1992); West Stockbridge Water Company, D.P.U. 91-143, at 6 (1992); Barnstable Water Company, D.P.U. 91-189, at 4 (1992); Cambridge Electric Light Company, D.P.U. 89-109, at 5 (1989).

Although the instant petition was filed under Section 92, the Settlement proposes the transfer of substantially all of DWW's assets to DWC. On the surface, it would appear that the Settlement requires Department approval under G.L. c. 164, § 96² ("Section 96"). In relevant part, the term "corporation" or "company" as used in G.L. c. 165, § 1, refers to "every person, partnership, association, or corporation, other than a municipal corporation, and other than a landlord supplying his tenant, engaged in the distribution and sale of water in the [C]ommonwealth through its pipes or mains." There is no question that both DWW and DWC are engaged in the distribution of water. However, the users of DWW's water system also comprise the shareholders of DWW and as such, they operate the system for their own benefit and assess themselves the cost of operation. Consequently, the Department finds that in the instant case there exists no sale for the purposes of G.L. c. 165, § 1. See Pond Meadow Water Trust Advisory Opinion, D.P.U. 80-1, at 5 (1980). We therefore conclude that DWW is not a water company as defined by G.L. c. 165, § 1.

Section 96 states that Department approval is necessary if both the acquiring and purchasing companies are Department-regulated systems, and therefore Section 96 would be operative if both DWW and DWC were regulated by the Department. Insofar as DWW is not subject to the Department's regulatory oversight under Section 96, we conclude that Section 96

² G.L. c. 164, § 96 is applicable to water companies pursuant to G.L. c. 165, § 2.

does not apply to this transaction. Therefore, we do not review this Settlement pursuant to Section 96. We review this Settlement as a resolution of the pending litigation which was filed pursuant to Section 92 and G. L. c. 165, §§ 2, 4.

V. ANALYSIS AND FINDINGS

The Department has evaluated fully the effect of the Settlement in light of the evidence presented. It is apparent that the parties to this proceeding have negotiated a settlement that is mutually satisfactory and that resolves the issues raised in the Section 92 petition which initiated this proceeding. Nevertheless, the fact that the resolution of DWW's petition was submitted in the form of a settlement does not diminish and cannot supplant the Department's responsibility of ensuring that the Settlement is consistent with the public interest.

Massachusetts Electric/Eastern Edison Merger, D.T.E. 99-47, at 15 (2000). Accordingly, the Department has evaluated the Settlement in light of the record evidence.

The acquisition of DWW by DWC will result in continued access to a safe, reliable water supply by DWW's existing customers. Despite efforts by its volunteer management, DWW has had a history of noncompliance with environmental regulations, and its well has been restricted to emergency use since 1997 (Exhs. DWC-3; DTE 1A-5(a)(1); DTE 1A-5(e)(5)). According to DWW, while it may be theoretically possible to place its well back into service with proper chlorination equipment, the difficulties of installing and maintaining this equipment render this option financially infeasible (Exh. DWC-1, at 13; Tr. at 20-21). Furthermore, DWW states that its ability to remain familiar with evolving environmental regulations, acceptable water operating procedures, and management practices

is beyond the present capacity of its volunteer management (Exh. DWW-1, at 3; Tr. at 31-33). DWW represents that without the transfer, its customers would be exposed to a catastrophic state of affairs with regard to securing a safe and reliable water supply (Tr. at 33). Finally, the transfer of DWW's assets to DWC would provide those residents on Bretton Road with an alternative to their present private wells, which may in the future be threatened by nitrates or overbuilt septic systems (Exhs. DWC-2; DTE 1-3; Tr. at 17-18). Additionally, DEP noted that DWW's well is compromised and concurred with DWW that it would require a significant expenditure of effort to put back on line (Tr. at 43).³ DEP expressed its full support of the unification of the DWW and DWC systems under one management (Tr. at 43).

In contrast to DWW's situation, DWC has a larger customer base and access to both capital and professional management (Exhs. DWC-1, at 1-2; DTE 1-3; DTE 1A-6; DTE 2-6; Tr. at 44-45; 2002 Annual Report to the Department). There is no water utility contiguous to DWW other than DWC, and DWC is familiar with the plant and operations of DWW (Exhs. DWC-2; DTE 1A-1; DTE 1A-2; DTE 1A-5). DWC's technical and managerial expertise in operating water systems has been acknowledged by the DEP (Tr. at 43-44). Based on the foregoing analysis, the Department concludes that the transfer of DWW's water supply system and substantially all of its rights and assets to DWC is consistent with the public interest.

³ The Department notes that DEP determined that DWW must install a permanent chlorination facility on or before August 15, 2003 (Exh. DTE 2-5, supp.). In a subsequent correspondence, DEP stated that it was willing to defer installation of the permanent chlorination system until after the Department rules on the instant Settlement (Exh. DTE 2-5, 2d. Supp.).

VI. ORDER

Accordingly, after due notice and consideration, it is hereby

ORDERED: That the Settlement Agreement between Dover Waterworks, Incorporated and Dover Water Company, Incorporated is approved.

By Order of the Department,

Paul B. Vasington, Chairman

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Dierdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).